

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR MR. CHIEF JUSTICE HARTON

1932 April 8

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TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5443

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HENRY H. BROOKE, APPELLANT,

vs.

WALTER E. CROSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JULY 10, 1931.

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Court of Appeals of the District of Columbia

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INDEX.

	Original	Print
Caption	<i>a</i>	1
Declaration	1	1
Pleas	6	5
Amended first plea.....	7	7
Note of issue; title of action; names of attorneys.....	8	7
Memorandum: Verdict for plaintiff for \$2,000.00.....	9	8
Motion for new trial.....	9	8
Motion for new trial argued, submitted, and overruled; judgment on verdict ordered; judgment; appeal noted.....	10	9
Memoranda: Supersedeas bond (\$3,000.00) on appeal approved and filed; proposed bill of exceptions filed; bill of exceptions signed and filed.....	11	9
Assignment of errors.....	11	10
Designation of record.....	12	10
Clerk's certificate.....	14	11
Notice of hearing on bill of exceptions.....	15	12
Bill of exceptions.....	16	12
Testimony of Walter E. Croson.....	16	13
H. L. Jacobs.....	19	16
Henry Brooke.....	21	17
Martin Brennan.....	22	18
Lawrence Dalton.....	23	19
Albert Winslowe.....	24	20
Instruction of court to jury.....	25	20

Court of Appeals of the District of Columbia

No. 5443.

HENRY H. BROOKE, Appellant,

VS.

WALTER E. CROSON.

a Supreme Court of the District of Columbia.

At Law.

No. 74124.

WALTER E. CROSON, Plaintiff,

VS.

HENRY H. BROOKE, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Declaration.

Filed October 10, 1927.

In the Supreme Court of the District of Columbia.

Law. No. 74124.

WALTER E. CROSON, Plaintiff,

VS.

HENRY H. BROOKE, Defendant.

The plaintiff, Walter E. Croson, sues the defendant Henry H. Brooke, defendant, for that heretofore, to wit:

on the 13th day of June, A. D. 1927, the said defendant was the operator of a certain automobile upon and along a certain public street in the City of Washington, District of Columbia, known as 20th street northwest, and going in a southerly direction along said street. That on the day and date aforesaid the plaintiff was operating a certain automobile westerly along L street, northwest, going at a slow rate of speed, to wit: less than ten miles per hour. That it became and was the duty of the defendant to so manage, operate and control his said automobile along said 20th street as not to collide with any other automobile being operated by any other person with due care and caution and without fault or negligence on the part of such other person.

Yet the said defendant not regarding his duty in the premises did then and there and on the date aforesaid so carelessly and negligently manage, operate and control the automobile which he was then and there operating as to cause the said automobile to collide with and strike with great force and violence the automobile which the plaintiff was then and there and without any negligence on his part operating in a westerly direction along L street northwest

2 at a slow rate of speed, and by reason of the said negligence of the defendant and the force and violence of the impact and collision of the automobile being operated by the defendant with the automobile being operated by the plaintiff, the automobile of the plaintiff was knocked and shoved along the street and overturned and the plaintiff was thrown with great force and violence from his seat in his automobile and by reason of the negligence of the defendant as aforesaid the plaintiff was greatly bruised wounded, hurt and injured, and plaintiff's back and sides and body and limbs and head and neck were greatly hurt, bruised and wounded, and plaintiff's left hand was lacerated and a bone thereof broken, and also an incomplete fracture of the lower left radius and plaintiff's nervous and muscular system shocked, bruised and impaired, and by reason of said hurts, bruises, wounds and injuries the plaintiff suffered and has continued to suffer great mental and physical pain and anguish and has suffered from headaches and loss of sleep and nervousness, and the plaintiff has been injured permanently and all of said bruises, wounds and injuries have continued for a

long time, to wit: from thence hitherto and the plaintiff will continue to suffer therefrom for the rest of his natural life. And the plaintiff avers that during all of said time, to wit: from the happening of said accident and collision he has been hindered and prevented from transacting his lawful business and affairs and by reason thereof the plaintiff has lost a large sum of money, to wit: one thousand dollars which he otherwise would have earned, and plaintiff was compelled by reason of his said injuries to lay out and expend in and about endeavoring to be cured of his said hurts, bruises and injuries a large sum of money, to wit: five hundred dollars, and plaintiff's automobile by reason of said collision was damaged to the amount to wit:

3 of three hundred dollars which the plaintiff was compelled to lay out and expend in necessary repairs, and the resale value of the plaintiff's automobile has by reason of the premises been reduced by a large sum, to wit: two hundred dollars, whereby and by reason of the premises the plaintiff has sustained damages and has been injured to the amount of, to wit: ten thousand dollars and therefore he brings this action and claims of the defendant the said sum of ten thousand dollars besides costs.

Second Count.

And the plaintiff, Walter E. Croson, further sues the defendant for that heretofore, to wit: on the 13th day of June, A. D. 1927, the said defendant, Henry H. Brooke, was the operator of a certain automobile upon and along a certain public street in the City of Washington, District of Columbia, known as 20th street, northwest and going in a southerly direction along said street. That on the day and date aforesaid the plaintiff was operating a certain automobile westerly along L street, northwest, going at a slow rate of speed, to wit: less than ten miles per hour. That it became and was the duty of the defendant to so manage, operate and control his said automobile along said 20th street as not to collide with any other automobile being operated by any other person with due care and caution and without any fault or negligence on the part of such other person. Yet the said defendant not regarding his duty in the premises did then and there and on the date aforesaid so carelessly and negligently manage, operate and control the automobile which he was then and there operating as to cause the said

automobile to collide with and strike with great force and violence the automobile which the plaintiff was then and there without any negligence on his part operating in a westerly direction along L street, northwest, at a slow rate of speed, and by reason of said negligence of the defendant and the force and violence of the impact and collision of the automobile being operated by the defendant with the automobile being operated by the plaintiff, the automobile of the plaintiff was knocked and shoved along the street and overturned and the plaintiff was thrown with great force and violence from his seat in his automobile and by reason of the negligence of the defendant as aforesaid the plaintiff was greatly bruised, wounded, hurt and injured, and the plaintiff's back and sides and body and limbs and head and neck were greatly hurt, bruised and wounded, and the plaintiff's left hand was lacerated and a bone thereof broken, and also an incomplete fracture of the lower left radius, nervous and muscular system shocked, bruised and impaired and by reason of said hurts, bruises, wounds and injuries the plaintiff suffered and has continued to suffer great mental and physical pain and anguish and has suffered from headaches and loss of sleep and nervousness and the plaintiff has been injured permanently and all of the said bruises, wounds and injuries have continued for a long time, to wit: from thence hitherto and the plaintiff will continue to suffer therefrom for the rest of his natural life. And the plaintiff avers that during all of said time, to wit: from the happening of said accident and collision he has been hindered and prevented from transacting his lawful business and affairs and by reason thereof the plaintiff has lost a large sum of money, to wit: one thousand dollars which he otherwise would have earned, and plaintiff was compelled by reason of said injuries to lay out and expend in and about endeavoring to be cured of his said hurts, bruises and injuries, a large sum of money to wit: five hundred dollars, and plaintiff's automobile by reason of said collision was damaged to the amount, to wit: of three hundred dollars, which the plaintiff was compelled to lay out and expend in necessary repairs, and the resale value of plaintiff's automobile has by reason of the premises been reduced by a large sum, to wit: two hundred dollars.

And the plaintiff says that the said collision and injury and loss and damages to the plaintiff and his said property

were caused and occasioned solely by the breach of duty and negligence of the defendant in failing to use due care in the operation of his said automobile on said street to avoid injury to the plaintiff and his property; and in negligently and carelessly failing to keep a proper lookout for the plaintiff while defendant was operating his said automobile; and in negligently and carelessly failing to keep his automobile under proper control; and in carelessly and negligently failing to bring his said automobile to a stop in time to avoid striking the plaintiff's automobile when the defendant saw and knew or by the exercise of reasonable diligence could have seen and known that the plaintiff was in a position of danger and was likely to be injured by the defendant's automobile; and in negligently operating his said automobile upon said street and public highway at a rate of speed greater than 22 miles per hour the said street and highway not being in any outlying district or any such arterial highway as directed by the director of traffic by virtue of the District of Columbia Traffic Act of 1925; and in recklessly operating by the defendant of his said automobile over said street and highway; and in operating his said automobile over said street and public highway at a rate of speed greater than was reasonable and proper, having regard to the width of the said street and highway, the use thereof and the traffic thereon, so as to endanger the plaintiff and his said property and damage the plaintiff and his property as aforesaid.

6 Wherefore and by reason of the negligence of the defendant as aforesaid the plaintiff has been damaged in the sum of ten thousand dollars and therefore he brings this suit and claims of the defendant damages in the sum of ten thousand dollars besides costs.

CRANDAL MACKEY,
Attorney for Plaintiff.

Pleas.

Filed November 3, 1927.

* * * * *

Second Plea.

And said defendant for further plea to said plaintiff's declaration, and to each and every count thereof, says, that

at the time and place of the collision of the automobile operated by the plaintiff with the automobile operated by the defendant, mentioned in said plaintiff's declaration, there was in force a certain traffic regulation, made by the Director of Traffic of the District of Columbia, and adopted and promulgated by the Commissioners of said District, pursuant to the District of Columbia Traffic Act, 1925, and known as Section 2-d of Article II of the Traffic and Motor Vehicle Regulations for the District of Columbia, to the following effect:

"A vehicle approaching a street intersection shall slow down and be kept under such control as to avoid colliding with pedestrians or vehicles. Operators of vehicles approaching a street intersection shall look out for and give the right of way to vehicles approaching from the right: *Provided*, That a vehicle making a right or left hand turn shall give the right of way to through traffic."

by virtue whereof, it then and there became and was the duty of the plaintiff to slow down the automobile operated by him westward along L Street approaching Twentieth Street, and to look out for and to give the right of way to the automobile operated by the defendant southward along said Twentieth Street approaching said L Street, as in the plaintiff's said declaration alleged; yet the plaintiff, carelessly and negligently disregarding his said duty, then and there did not slow down the automobile operated by him, and did not look out for and give the right of way to the automobile operated by the defendant, whereby the automobile then and there operated by the plaintiff was caused to collide with the automobile then and there operated by the defendant, so that if any hurt, by the said collision then and there occurring, came to the plaintiff, it was the result of the said plaintiff's own wrong and negligence aforesaid.

* * * * *

GLENN WILLETT,
HARRY H. MILLARD,
Attorneys for Defendant.

Service acknowledged this 3d day of November, 1927.

CRANDAL MACKEY,
Attorney for Plaintiff.

Amended First Plea.

Filed April 9, 1928.

* * * * *

Now comes the defendant in the above-entitled cause, and, by leave of the Court in this behalf first had and obtained, for his amended first plea to the declaration of the plaintiff herein filed, and to each and every count thereof, says, that he admits that on a certain day in June, A. D. 1927, to wit, on the thirteenth day of said month in the year aforesaid, he was the operator of a certain automobile upon and along a certain public street in the City of Washington, District of Columbia, known as 20th Street Northwest, and going in a southerly direction along said street; and he further admits that on the day and date aforesaid the plaintiff was operating a certain automobile westerly along L Street Northwest, in said City and District; and he further admits that at the time aforesaid, at or near the intersection of said streets, the said automobile so operated by the defendant and the said automobile so operated by the plaintiff came into collision, but the defendant denies each and every allegation in said plaintiff's declaration not hereby expressly admitted.

HARRY H. MILLARD,
GLENN WILLETT,
Attorneys for Defendant.

Service acknowledged April 9, 1928.

CRANDAL MACKEY,
Attorney for Plaintiff.

Note of Issue.

Filed August 6, 1928.

* * * * *

Title of action: As above.

Names of attorneys: Crandal Mackey, Argyle Mackey, 917 15th N. W., for plaintiff; Glen Willet, Harry H. Millard, Transportation Building, for defendant.

Last pleading filed August 6, 1928.

The clerk will please calendar.

CRANDAL MACKEY,

Atty. for Plaintiff.

ARGYLE MACKEY,

Atty. for Plaintiff.

9

Memorandum.

February 18, 1931.—Verdict for plaintiff for \$2,000.00.

Motion for New Trial.

Filed February 24, 1931.

* * * * *

The defendant moves the Court to vacate and set aside the verdict herein rendered and to grant a new trial of the said cause, and for grounds of this motion the defendant assigns the following:

1. That the Court erred in overruling the defendant's objection to evidence tending to show that the defendant was insured against the accident which is the basis of this suit and in admitting the same to be considered by the jury, to which ruling and action of the Court the defendant duly excepted.

2. That the Court erred in not *sua sponte* withdrawing the case from further consideration by the jury upon the introduction of evidence tending to show that the defendant was insured as aforesaid, and upon counsel for plaintiff commenting upon such evidence in his closing remarks to the jury.

3. That the Court erred in not *sua sponte* striking out and instructing the jury to disregard the evidence tending to show that the defendant was insured as aforesaid, and the comments thereon of counsel for plaintiff in his closing remarks to the jury.

4. That the amount of the damages found and awarded by the jury in their verdict is excessive, and contrary to law and the evidence.

5. That said verdict is contrary to the weight of
10 the evidence.

HARRY H. MILLARD,

GLENN WILLETT,

Attorneys for Defendant.

Messrs. Crandal Mackey and Argyle Mackey,
Attorneys for Plaintiff,
719 Fifteenth Street N. W.,
Washington, D. C.:

Take notice that the foregoing motion will be brought to the attention of the Court on Friday, February 27, 1931, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

HARRY H. MILLARD,
GLENN WILLETT,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

Friday, March 13, 1931.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record, and thereupon defendant's motion for a new trial filed herein is argued and submitted to the Court, and being considered is hereby overruled and judgment on verdict ordered.

Wherefore it is considered that plaintiff recover of the defendant herein the sum of Two Thousand (\$2,000.00) Dollars, with interest thereon from this date, together with costs of suit to be taxed by the Clerk, and have execution thereof.

From the foregoing judgment, the defendant by his said attorneys in open Court, notes an appeal to the Court of Appeals; whereupon, the maximum of an undertaking to operate as a supersedeas, is hereby fixed in
11 the sum of Three Thousand (\$3,000.00) Dollars.

Memoranda.

March 27, 1931.—Supersedeas Bond (\$3,000.00) on Appeal approved and filed.

April 6, 1931.—Proposed Bill of Exceptions filed.

April 14, 1931.—Bill of Exceptions signed and filed.

Assignment of Errors.

Filed April 14, 1931.

* * * * *

Now comes Henry Brooke, the defendant, and assigns the following errors as having been made by the Court herein:

1. In overruling the defendant's objection to evidence tending to show that the defendant was insured against liability in this case.

2. In permitting evidence tending to show that the defendant was insured against liability in this case to be received and considered by the jury.

3. In not *sua sponte* withdrawing the case from the jury upon the introduction of testimony tending to show that the defendant was so insured.

4. In not *sua sponte* striking out the testimony tending to show that defendant was so insured, and instructing the jury to disregard the same.

12 5. In overruling the defendant's motion for a new trial.

GLENN WILLETT,
Of Counsel for Defendant.

Service of a copy of the foregoing Assignment of Errors is hereby acknowledged this 14th day of April, 1931.

CRANDAL MACKEY,
Of Counsel for Plaintiff.

Designation of Record.

Filed April 14, 1931.

* * * * *

Now comes Henry Brooke, the defendant in the above-entitled cause, and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. The declaration.

2. The amended first plea and the original second plea.

3. The note of issue, and notice to calendar.

4. Memo.: Verdict of the Jury for the plaintiff in the amount of \$2,000.
 5. Motion for new trial.
 6. Memo.: Motion for new trial overruled, and judgment for plaintiff on verdict ordered.
 7. The judgment.
 8. Memo.: Appeal noted.
 9. Memo.: Bond filed and approved.
 10. Bill of exceptions.
 11. Assignment of errors.
 12. This designation of record.
- 13

GLENN WILLETT,
Of Counsel for Defendant.

Service of a copy of the foregoing Designation of Record is hereby acknowledged, this 14th day of April, 1931.

CRANDAL MACKEY,
Of Counsel for Plaintiff.

14 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from one to 13, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 74124 at Law, wherein Walter E. Croson is Plaintiff and Henry H. Brooke is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 6th day of July, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

15 In the Supreme Court of the District of Columbia,
Circuit Division.

At Law.

No. 74124.

WALTER E. CROSON, Plaintiff,

vs.

HENRY BROOKE, Defendant.

Notice of Hearing on Bill of Exceptions.

Messrs. Crandal Mackey and Argyle Mackey,

Attorneys for Plaintiff,

719 Fifteenth St. N. W.,

Washington, D. C.:

Take notice that the within bill of exceptions will be called to the attention of and submitted to the Court on the eighth day of May, 1931, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for the purpose of having the same signed and sealed by the Court.

GLENN WILLETT,

Of Counsel for Defendant,

930 Shoreham Bldg., Wash., D. C.

Service of the foregoing notice and copy of said bill of exceptions acknowledged this 6th day of April, 1931.

CRANDAL MACKEY,

Of Counsel for Plaintiff.

16 In the Supreme Court of the District of Columbia,
Circuit Division.

At Law.

No. 74124.

WALTER E. CROSON, Plaintiff,

vs.

HENRY BROOKE, Defendant.

Bill of Exceptions.

Be it remembered, that at the trial of this case before Mr. Justice Siddons and a jury, duly empaneled and sworn to

try the issues herein, which trial began on the seventeenth day of February, 1931, and thereafter further proceeded with, **Walter E. Croson**, plaintiff herein, being first duly sworn, testified on his own behalf, on direct examination, in substance, as follows:

That he was a resident of Arlington County, Virginia, and employed as an automobile salesman; that he was 25 years of age; that in the morning of June 13, 1927, at about five minutes past seven o'clock, he was driving his Chevrolet automobile in a westerly direction upon and along L Street, northwest, in the District of Columbia, proceeding toward the intersection of twentieth street with said L Street; that when he had reached a place about 120 feet east of said intersection he was required to stop and did stop his automobile by reason of another automobile backing into L street from a vacant lot situated on the north side of L Street; that he then proceeded westerly along L Street toward its intersection with twentieth street, first shifting into low gear and then into second gear; that he was still proceeding in second gear upon reaching the intersection of said streets; that when he had reached a place about 60 feet east from said street intersection he first noticed the defendant's Ford automobile traveling southward on twentieth street and approaching said street intersection from the north; that when he first saw defendant's automobile it was at a place which he afterward ascertained was 250 feet north of said street intersection; that upon reaching said street intersection he proceeded into and across the intersection; that after he had passed the center of said intersection the defendant's automobile struck the rear right wheel and fender of his automobile; that by force of the collision thus brought about his automobile was carried to the south curb of L street a short distance west of the west curb of twentieth street, and at that place tipped over upon its side; that he was within his automobile when the same was thus tipped over; that his automobile was righted by some colored men and he was thus released; that he remained at the place of the accident until Police Officer Jacobs appeared there a few minutes later; that Officer Jacobs talked both with him and with the defendant; that he was then taken to Emergency Hospital, in a passing automobile, where his left hand and left fore-arm were X-rayed and the

wound of his left hand was dressed; that he arrived at the hospital at about 7:20 o'clock, was obliged to wait until 7:55 o'clock before being treated, and left the hospital shortly after 8 o'clock; that upon leaving the hospital he went to the Sanitary Grocery store at twentieth and H Streets, northwest, where defendant was then employed; that he there met and talked with defendant about the accident; that defendant then and there made statements whereby defendant admitted that the accident resulted from defendant's own fault; that the substance of defendant's statements was that defendant was due at the store at 7 o'clock, that defendant was five minutes late at the time of the accident, that the plaintiff would not suffer any loss as he (the defendant) was fully insured.

Whereupon the defendant, by his counsel, objected to the reception and consideration by the jury of any evidence tending to show that the defendant was insured against liability arising from this accident, on the ground that such evidence is wholly incompetent and prejudicial under the issues in this case, and claimed the protection of the Court in accordance with the ruling of the Court of Appeals of the District of Columbia in its decision in Capital Construction Company vs. Holtzman, 27 App. D. C. 125, which was cited to the Court; but the Court, after hearing argument

18 both for the plaintiff and the defendant, by their respective counsel, expressed the opinion that the ruling cited and relied upon by the defendant was not applicable to this case, as the mention of insurance came into the testimony in this case as part of a conversation which was clearly admissible, and thereupon overruled the defendant's objection and admitted the evidence to be considered by the jury along with the other evidence in the case, to which ruling and action of the Court the defendant by his counsel then and there duly excepted.

Continuing, the plaintiff further testified, that defendant in said conversation did not claim plaintiff was in fault or make any defense of himself; that as to plaintiff's personal injuries he suffered from the accident a lacerated wound on his left hand, a broken bone in his left hand and an incomplete fracture of one of the bones in his left fore-arm; that for these injuries he was treated at Emergency Hospital on six or seven occasions, at a cost of \$25; that afterward, in July he suffered pains in his back and head and a

high fever, for treatment of which he consulted Dr. J. H. Walton, of Arlington County, Virginia, who removed him to Georgetown Hospital and called in a specialist for consultation; that Dr. Walton's bill was \$100, that the specialist's bill was \$40 and that the hospital bill was \$140, as to which costs and expenses the plaintiff was asked by his counsel whether or not they were rendered necessary as a result of the accident, but the Court, upon objection by the defendant's counsel, sustained said objection and the plaintiff's answer was not received; that he had been employed at a gasoline filling station until the accident at wages of \$25 per week; that as a result of his injuries sustained in the accident he lost said employment and was not again employed for three months, at the end of which time he obtained employment at \$18 per week and again was able to earn \$25 per week at the end of nine months; that, as to his automobile and damage thereto as a result of the accident, it was a Chevrolet Coupe which he bought second-hand for \$475, of which he paid one-third at the time
19 of purchase and had paid \$30 on account of the balance; that the cost of repairs to his automobile by Pohanka Garage was about \$200; that at the time of trial he was fully recovered of his personal injuries except that he still suffered some weakness in his left hand.

Whereupon, upon cross-examination by defendant's counsel, plaintiff testified in substance that he was 21 years old at the time of the accident, that he was then returning to Cherrydale, Virginia, where he was employed at a gasoline filling station, and where he was required to report for work at 8 o'clock; that he was a licensed operator and had then been driving a car for about three years; that at the time of the accident the weather was clear and the street was dry; that as he approached the street intersection where the accident occurred he was driving at a speed of about 10 miles per hour; that he did not stop before attempting to cross the intersection; that the defendant was approaching the intersection on his right; that defendant was going about 40 miles per hour; that he did not stop and thus allow defendant to pass because he thought he could "make it" ahead of defendant; that he could not judge defendant's speed very well at the time as defendant was coming toward him; but that after the accident he calculated the defendant's speed by measuring the distance

of 250 feet defendant traveled while he traveled about 60 feet at the rate of 10 miles per hour, and that all his testimony in the case relating to speed and distances, except the speed of his own car, was based on calculations and measurements made by him after the accident.

Whereupon the plaintiff called as a witness in his behalf Metropolitan Police Officer **H. L. Jacobs**, who, being first duly sworn, testified in substance that he, being in the neighborhood of 20th and L streets, heard the crash of a collision but did not see the collision; that he went at once to the scene and talked both with the plaintiff and with the defendant; that he could not remember any statement made to him either by the plaintiff or by the defendant except that the defendant said he was late for work; that the crash occurred at about 5 minutes after 7 o'clock; that he fixed the time by reference to his having "turned in" at 7 o'clock which was about five minutes before he heard the crash; that he noticed skid marks, as if made by locked wheels, on the pavement, which he traced to both cars which were involved in the accident; that one set of these skid marks began in 20th street about 10 feet north of the north curb line of L Street and showed westward toward the defendant's car which was overturned on the north side of L Street west of its intersection with 20th Street; that the other set of skid marks began in L Street a few feet east of the east curb line of 20th Street and showed in the direction of plaintiff's car which was overturned on the south side of L Street somewhat west of the intersection.

Whereupon plaintiff, by his counsel, produced and read in evidence (with the consent of the defendant) a transcript of the records of Emergency Hospital of the treatment there of the plaintiff on the day of the accident and on six subsequent occasions showing an incomplete fracture of the radius in plaintiff's left fore-arm, the complete fracture of one of the bones in plaintiff's left hand, a lacerated wound in plaintiff's left hand, and treatment for all of said injuries.

Plaintiff rested.

Whereupon the defendant, by his counsel, produced and read in evidence a certified copy of a certain traffic and

motor vehicle regulation, by him pleaded in his second plea, of the tenor following:

“Washington, January 16, 1931.

“I hereby certify that the following is a correct copy of paragraph (d) of Section 2, Article II, of the Traffic and Motor Vehicle Regulations for the District of Columbia in effect on June 13, 1927:

“(d) A vehicle approaching a street intersection shall slow down and be kept under such control as to avoid colliding with pedestrians or vehicles. Operators of vehicles approaching a street intersection shall look out for and give the right of way to vehicles approaching from the right: Provided, That a vehicle making a right or left hand turn shall give the right of way to through traffic.

[Seal District of Columbia.]

(Signed)

“DANIEL E. GARGES,

“DANIEL E. GARGES,

Secretary Board of Commissioners, D. C.”

And thereupon the defendant, as a witness in his own behalf, being first duly sworn, upon his direct examination testified in substance, that at the time of trial he was 62 years old and was about 58 years old in June, 1927; that he was licensed in the District of Columbia to operate a motor car, and had been driving an automobile for several years; that in June, 1927, he was employed as manager of the Sanitary Grocery Store located at 20th and H Streets, N. W., in said District; that he then resided and still resides at 2010 Kalorama Road, northwest; that on the morning of June 13, 1927, he left his home at the usual time, about 6:40 o'clock, and drove his Ford Coupe south on 20th Street to the intersection of 20th and L Streets, N. W., where he came into collision with the plaintiff's car; that he was not in a hurry as he had ample time to reach his store shortly before 7 o'clock at which hour he was due at the store; that the collision occurred at about 10 minutes before 7 o'clock; that as he approached the intersection of 20th and L Streets, N. W., he was driving at a speed of 15 to 18 miles per hour; that there was a truck parked on the north side of L Street just east of the intersection which obstructed his view to the east; that he did not see

22 plaintiff's car until he was within the intersection, and then plaintiff's car appeared to come upon him from behind the truck at a rapid speed; that it all happened very suddenly; that when he saw a collision was imminent he turned his car to the right as if to turn west into L Street and thus avoid collision, but did not succeed in avoiding plaintiff's car; that plaintiff's car struck his car on his left front fender, damaging it somewhat, and he afterward found the front axle of his car was slightly bent; that the two cars ran together westward into L Street, west of the intersection, and there both cars tipped over; that according to his recollection his car tipped over and rested on its side on the south side of L Street, and the plaintiff's car tipped over and came to rest on the north side of L Street; that he was considerably "shaken up" but not much hurt by the collision; that he never told Officer Jacobs that he was late for work at the time of the accident; that he never admitted to anyone that the accident was due to his fault; that he did talk with plaintiff at his store when the plaintiff came there after the accident, on which occasion he told plaintiff that if he were at fault he would prefer to settle out of court but that the accident was not due to his fault.

Whereupon, upon cross-examination by plaintiff's counsel, defendant further testified in substance that he was not late for work at the time the accident occurred, that he did not consider himself at fault, that he was due at his store at 7 o'clock, that he was the only employee of that store who had the keys to the store, that it was his duty to be there at 7 o'clock and open the store, that the accident happened before 7 o'clock, that he did not see plaintiff's car until they were both in the intersection and the plaintiff's car was "right on top of me," and that he tried to turn to the right but there was not time to get out of the plaintiff's way; that he did not know who was in fault.

Whereupon, as a witness on behalf of the defendant, **Martin Brennan**, being first duly sworn, testified in
23 substance that he was a taxi-cab driver employed by Mayflower Sight-Seeing and Taxi Service; that on the morning of June 13, 1927, he had his cab at the curb on the south side of L Street, N. W., between 18th and 19th

Streets, near 19th Street, and was dusting it off; that he noticed plaintiff's car pass him rapidly, going west, but did not watch it after it passed (at this point counsel for plaintiff interposed objection, that the accident was 500 feet west of where witness was, and the foregoing evidence was admitted for the purpose of fixing the time); that it was then not quite 7 o'clock; that very shortly thereafter he heard a crash and immediately went to 20th and L Streets and there saw the car which had shortly before passed him, as well as the defendant's car, in a smash-up; that he there saw Officer Jacobs and the plaintiff and the defendant; that he saw Officer Jacobs talking with the defendant but did not hear what they said; and that both cars were overturned, the plaintiff's Chevrolet car on the south side and the defendant's Ford car on the north side of L Street west of the intersection.

Upon cross-examination witness testified, in substance, that, in fixing the time, he did so with reference to the fact that he was first on call that morning, that he allowed himself ample time to clean up his cab; that he was due to be called at 7:30 o'clock; and that he did not look at his watch.

Whereupon, defendant called as a witness one **Lawrence Dalton** (colored), who, being first duly sworn, testified in substance that he was a taxi-cab driver, that he knew the plaintiff and the defendant and saw them at 20th and L Streets, N. W., involved in an automobile accident in June, 1927; that at the time and place of the accident he and Albert Winslowe were present; that he was walking east on the north side of L Street, had crossed 20th Street, and while still on the north side of L Street and proceeding eastward, at a point a little east of 20th Street, he heard screeching of brakes behind him, followed by a crash; that he turned and saw plaintiff's car and defendant's car "locked together" in collision moving westward into L Street, west of the intersection, where both cars turned over; that he and Winslowe helped to right the cars; that plaintiff seemed to have his left hand or arm pinned under the car; that plaintiff's hand was bleeding; that plaintiff's car was lying on its side on the south side of L Street west of the intersection, and defendant's car was lying on its side on the north side of L Street *Street* west of the intersection.

On cross-examination witness testified, in substance, that he did not actually see the two cars collide but that he heard the crash behind him; that he did not remember what time it was, and it might have been after 7 o'clock; that he did not see the cars strike together, but when he turned around he saw them running into L Street.

Whereupon, defendant called as a witness on his behalf **Albert Winslowe** (colored) who testified in substance, that he was employed as a janitor; that he remembered an automobile accident at 20th and L Streets in June, 1927, in which the plaintiff and the defendant were involved; that he was on the south side of L Street near 20th Street; that he heard a crash; that he saw two cars in collision turning over in L Street west of 20th Street; that he and Lawrence Dalton helped right the plaintiff's car and helped the plaintiff out of his car, and then helped right the defendant's car.

On cross-examination witness testified, in substance, that he did not remember what time it was, but it was early in the morning; that he did see the collision, and that the plaintiff's car ran into the defendant's car.

Defendant closed.

Plaintiff offered no evidence in rebuttal.

The foregoing is the substance of all the evidence.

Whereupon counsel for the plaintiff and for the defendant, respectively, argued the case to the jury.

25 Thereupon the Court (Siddons, J.) instructed the jury upon the law in the case, and submitted the same to the jury for their verdict.

Thereupon the Jury retired to consider their verdicts.

The foregoing is the substance of all the testimony bearing upon the exceptions herein taken and noted on behalf of defendant.

And thereupon, and as all of said exceptions were duly noted and allowed as aforesaid, and duly entered upon the minutes of the Court, before the jury retired to consider of its verdict, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the defendant may have his case reviewed on appeal, the defendant, by his attorneys, move the court to sign and seal

this, his bill of exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is granted by the court; and thereupon the defendant tenders this, his bill of exceptions, and requests the court to sign and seal the same, which is accordingly done, now for then, this 14th day of April, 1931.

F. L. SIDDONS,
Justice.

Approved:

GLENN WILLETT,
Of Counsel for Defendant.
CRANDAL MACKEY,
Of Counsel for Plaintiff.

26 [Endorsed:] At Law. No. 74124. Walter E. Croson, plaintiff, vs. Henry Brooke, defendant. Bill of exceptions and notice. Harry H. Millard, Glenn Willett, Attorney- at law, Shoreham Bldg., Washington, D. C.

Endorsed on cover: District of Columbia Supreme Court. No. 5443. Henry H. Brooke, appellant, vs. Walter E. Croson. Court of Appeals, District of Columbia. Filed Jul. 10, 1931. Henry W. Hodges, Clerk.

FOR MR. JUSTICE BROWN

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

GOT 30 1931

Henry W. Hodges

IN THE

CLERK

Court of Appeals, District of Columbia.

APRIL TERM, 1931.

No. 5443.

HENRY H. BROOKE, APPELLANT,

v.

WALTER E. CROSON.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANT.

HARRY H. MILLARD,

GLENN WILLETT,

Attorneys for Appellant.

IN THE
Court of Appeals, District of Columbia.

APRIL TERM, 1931.

HENRY H. BROOKE, *Appellant*,
v.
WALTER E. CROSON. } No. 5443.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANT.

I.

STATEMENT OF THE CASE.

This was an action on the case for negligence brought in the Court below by Walter Croson as Plaintiff, appellee here, against Henry H. Brooke as Defendant, appellant here, to recover damages resulting from a collision of the automobile operated by the plaintiff with the automobile operated by the defendant at the intersection of Twentieth and L Streets, northwest, in the District of Columbia, at about 7 o'clock in the morning of June 13, 1927.

The case was brought to trial in the Supreme Court of the District of Columbia, before Mr. Justice Siddons and a jury, on February 17, 1931, and concluded on the following day.

The plaintiff's declaration alleges that Plaintiff Croson was driving his car west in L Street approaching 20th Street, while Defendant Brooke was driving his car south in 20th Street approaching L Street, at which intersection

they collided, which allegations the defendant admitted in his amended first plea. The declaration charged the defendant with negligence in the operation of his car to the plaintiff's damage (R. 1-5), which charge the defendant by his amended first plea denied (R. 7), and the defendant by his second plea alleged that the collision and resulting damage were due to the plaintiff's own negligence (R. 5-7).

At the trial, Plaintiff Croson, after testifying to the manner in which the collision occurred, further testified that, shortly thereafter he was taken to Emergency Hospital for treatment; that he reached the hospital at about 7.20 o'clock; that he was obliged to wait until 7.55 o'clock before being treated; that he left the hospital shortly after 8 o'clock; that he then went to the Sanitary Grocery Store at 20th and H Streets, northwest, where defendant was then employed and where he met and talked with defendant about the accident; that defendant then and there made statements whereby defendant admitted that the accident resulted from defendant's own fault; that the substance of defendant's statements was that defendant was due at the store at 7 o'clock, that defendant was five minutes late at the time of the accident, **THAT THE PLAINTIFF WOULD NOT SUFFER ANY LOSS AS HE (THE DEFENDANT) WAS FULLY INSURED** (R. 13-14). What occurred at this point in the trial, in the presence and hearing of the jury, is thus stated in the bill of exceptions (R. 14):

"Whereupon the defendant, by his counsel, objected to the reception and consideration by the jury of any evidence tending to show that the defendant was insured against liability arising from this accident, on the ground that such evidence is wholly incompetent and prejudicial under the issues in this case, and claimed the protection of the Court in accordance with the ruling of the Court of Appeals

of the District of Columbia in its decision in *Capital Construction Company v. Holtzman*, 27 App. D. C. 125, which was cited to the Court; but the Court, after hearing argument both for the plaintiff and the defendant, by their respective counsel, expressed the opinion that the ruling cited and relied upon by the defendant was not applicable to this case, as the mention of insurance came into the testimony in this case as part of a conversation which was clearly admissible, and thereupon overruled the defendant's objection and admitted the evidence to be considered by the jury along with the other evidence in the case, to which ruling and action of the Court the defendant by his counsel then and there duly excepted."

The bill of exceptions (R. 12-21), which contains not only the substance of all the testimony bearing upon the exception noted at the trial but as well the substance of all the evidence (R. 20), discloses, in some particulars, a sharp conflict between the plaintiff's testimony and that of the defendant as to the manner in which the accident occurred, but the testimony of all the other witnesses, including the one called by the plaintiff, is corroborative of the defendant's testimony, notwithstanding which the jury returned a verdict for the plaintiff of \$2,000 (R. 8).

The defendant moved the Court to grant a new trial, on the grounds, among others, that the Court erred in admitting evidence of the defendant's insurance to go to the jury, and that the verdict is contrary to the evidence and the weight of the evidence (R. 8), but that motion was overruled by the Court, and judgment was entered on the verdict, to reverse which judgment this appeal is prosecuted (R. 8-9).

II.

ASSIGNMENT OF ERRORS.

The trial Court erred:

1. In overruling defendant's objection to evidence tending to show that the defendant was insured against liability in this case.

2. In permitting evidence tending to show that the defendant was insured against liability in this case to be received and considered by the jury.

3. In not *sua sponte* withdrawing the case from the jury upon the introduction of testimony tending to show that the defendant was so insured.

4. In not *sua sponte* striking out the testimony tending to show that the defendant was so insured, and instructing the jury to disregard the same.

III.

ARGUMENT.

THE TESTIMONY THAT DEFENDANT WAS INSURED AGAINST LIABILITY WAS INCOMPETENT FOR ANY PURPOSE, AND THE ACTION OF THE TRIAL COURT IN PERMITTING IT TO GO TO THE JURY, TO BE CONSIDERED ALONG WITH THE OTHER EVIDENCE IN THE CASE, WAS REVERSIBLE ERROR.

This proposition is based upon the settled law of this District, which, indeed, is founded in the practical common sense of lawyers and judges of experience, who, we think, generally recognize that if, as the result of an accident, a plaintiff has suffered sufficient damage to arouse the

sympathy of his fellow-men, and if his version of the accident is fairly plausible, and if he is permitted to show to the jury that the defendant was "fully insured" against liability, the plaintiff, as in this case, without troubling himself much about corroborating testimony, and without taking the pains to show the precise nature of his property damage, and without even producing as a witness the principal physician who treated him for his personal injuries, may feel assured of a substantial verdict. In such case, more especially if the defendant was not much hurt or otherwise damaged, as in this case (R. 18), the attention of the jury is diverted from the issue of negligence, they are enticed away from their duty to weigh and consider all the evidence, and are misled into the false and dangerous assumption that the matter will be set right by compelling an insurance company to bear the burden of the plaintiff's misfortune.

In *Capital Construction Co. v. Holtzman*, 27 App. D. C. 125, reversing judgment for plaintiff, in ruling upon the competency of testimony tending to show that the defendant, corporate lessee and operator of an apartment house, was insured against liability arising from the use of its elevators, this Court, at pages 132-133, say:

"We think it was error to permit the witness Stokes to be questioned as to the defendant being protected by an insurance company, and that, as the question was wholly incompetent, even if the jury had been told to disregard the testimony, and it had been stricken from the record, the error would not have been cured. We have no doubt that it, taken in connection with the other proceedings complained of, might and probably did influence the jury in fixing the amount of damages."

In the same case, the Court, ruling upon the sufficiency

of the objection to the question, which was not grounded on its incompetency, at page 131 say:

“The question whether the insurance company insured the defendant was, in our opinion, incompetent for any purpose. The objection was not based upon its incompetency; nevertheless, we think the question was one of those that requires only a general objection. It is one of those questions where an objection is an admission of the correctness of the statement embodied in the question. Such questions ought not to be asked, and, when asked, the Court ought not to inquire too closely into the ground upon which the objection is based.”

It can make no difference in the decision of this case that in the *Holtzman* case the fact of insurance was brought to the attention of the jury by persistent questioning by counsel, whereas in this case it was volunteered by the plaintiff himself on direct examination. The inquiry does not direct itself to the persistency of counsel, but rather to the prejudicial character of the fact. The manner of bringing prejudicial facts to the attention of the jury can not be important. In this case the plaintiff volunteered the fact of insurance (R. 14); defendant objected and asked the protection of the Court (R. 14); thereupon in the presence and hearing of the jury, counsel for the plaintiff and the defendant argued the admissibility of the testimony, and the Court expressed the opinion that the ruling cited and relied upon by the defendant (the *Holtzman* case, R. 14) was not applicable to this case, as the mention of insurance came into the testimony in this case as a part of a conversation which was clearly admissible, and thereupon overruled the defendant's objection and admitted the evidence to be considered by the jury along with the other evidence in the case. It is submitted that the testimony of the plaintiff, the objection by defendant,

the argument of counsel, and especially the direct and positive ruling of the trial Justice were more impressive than mere persistent questioning by counsel could have been.

In the *Holtzman* case, the question of the defendant's liability insurance was directed to the witness Barrett, an employee of the insurance company which insured the defendant's elevators, and it was contended that the fact that his employer was the insurer tended to show the bias of the witness and was admissible for that purpose. Upon that point this Court, at page 138, say:

"At the most it was only permissible to prove, for the purpose of showing the bias of the witness Barrett, that he was an employee of the Fidelity & Casualty Company, and that that Company had insured the defendant's elevator. To show the nature of the insurance was not necessary to show the witness's bias."

Thus, this Court did not decide that such evidence is admissible even to show bias, but if it did, there is no such ground of admissibility in this case.

Corpus-Juris, Volume 36, page 1128, Section 128, states:

"As a general rule, it is reversible error, in an action for injuries, to permit plaintiff to show either directly or indirectly, that defendant is insured against liability since it can have no tendency but to induce a verdict based on the ground that an insurance company and not defendant would be affected";

and cites, in support of this proposition, numerous decisions, including *Capital Construction Company v. Holtzman*, *supra*.

In *James Stewart & Co. v. Newby*, 266 Fed. Rep. 287 (C. C. A., Fourth Circuit, 1920), plaintiff offered evidence

to show that defendant was protected by liability insurance, to which objection was made, which evidence was received, the trial Justice reserving his ruling upon its admissibility until the close of the trial, at which time the trial Justice sustained the objection and instructed the jury to disregard the testimony on that point. Judgment entered upon a verdict for the plaintiff was reversed, the Court, at page 295 saying:

“The last question in the case relates to the testimony as to the employer’s protection by liability insurance. It is true that the testimony was ultimately ruled out. This, however, was not done promptly. Complainant’s counsel brought the matter to the attention of the jury at almost the beginning of the trial, and by repeated efforts persistently directed the attention of the jury to it, and it was not until the conclusion of the whole testimony that it was finally excluded. The general rule is that, where inadmissible evidence has been received during a trial, the error is cured by its subsequent withdrawal, or by an instruction of the Court to disregard it.”

Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; *Specht v. Howard*, 16 Wall. 564, 21 L. Ed. 348; *Union P. R. Co. v. Thomas*, 152 Fed. 371, 81 C. C. A. 491; *Armour Co. v. Kollmeyer*, 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. (N. S.) 1114; *Horsford v. Glass Co.*, 92 S. C. 260, 75 S. E. 553.

“There is this exception to the rule. Where the evidence thus admitted is so impressive that in the opinion of the appellate court its effect is not removed from the minds of the jury by its subsequent withdrawal, or by the instruction of the court to disregard it, the judgment will be reversed.”

Armour & Co. v. Kollmeyer, *supra*; *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663; *Waldron v. Waldron*, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453; *Horsford v. Glass Co.*, *supra*.

“Whether the effect of the evidence thus improperly introduced may be subsequently removed by its exclusion and an instruction to disregard it depends upon the character of the evidence. This court must take cognizance of the general recognition among the members of the bar, as well as by the courts, of the harmful effect upon the minds of jurors of such testimony as was here sought to be introduced. The only purpose for which such evidence is introduced is to prejudice the jury, and the poison is of such character that, once being injected into the mind, it is difficult of eradication. Where it is allowed to remain during the whole course of a trial, and by persistent unrebuked references is allowed to influence the jurors’ consideration of all the other evidence during the trial, the antidote of a final instruction to disregard the testimony is ineffective. The removal of the fly does not restore an appetite for the food into which it has fallen. The exclusion of the testimony should be prompt and decisive, and should leave no doubt, either of the impropriety of the attempt to introduce it, or of the court’s condemnation of such attempt. Verdicts can not be relieved of the danger of criticism as long as there is a basis for the opinion that they have been rendered through the influence of prejudice.

“Not a few of our courts have gone to the extent of holding that a case should be withdrawn from the jury and a mistrial ordered for the mere asking of a question of the character under consideration, on the ground that the effect of it is so harmful that it can not be removed by the instruction of the court, and that the conduct of counsel in such case is so culpable that he ought not to be permitted to enjoy the fruits of a verdict which might have been influenced by such question. The authorities are overwhelming that such evidence is inadmissible, that it should be promptly excluded, and that the striking of testimony when once admitted does not obviate the necessity for a new trial, if the evidence is so impressive that its effect is not removed by sub-

sequent withdrawal or instruction to disregard. To the cases above cited may be added *Washington Gas Light Co. v. Lansden*, 172 U. S. 541, 19 Sup. Ct. 296, 43 L. Ed. 543; *Maytag v. Cummings*, 260 Fed. 75; *Knickerbocker Trust Co. v. Evans*, 188 Fed. 550, 110 C. C. A. 347; *Chicago, M. & St. P. Ry. Co. v. Newsome*, 174 Fed. 394, 98 C. C. A. 1; *Levy v. J. L. Mott Iron Works*, 143 App. Div. 7, 127 N. Y. Supp. 506; *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494; *Steve v. Bonners Ferry Lumber Co.*, 13 Idaho, 384, 92 Pac. 363; *Walters v. Appalachian Power Co.*, 75 W. Va. 676, 84 S. E. 617; *Herrin v. Daly*, 80 Miss. 340, 31 South. 790, 92 Am. St. Rep. 605. The case of *Horsford Glass Co.*, 92 S. C. 236, 75 S. E. 533, is directly in point, and the able opinion of Mr. Justice Woods in that case fully sustains the views herein expressed."

Carter v. Walker, 165 S. W. 483 (Texas Civil Appeals, 1914), is also in point, from the opinion in which the following is quoted (page 486):

"When appellee was testifying, he was asked if he had ever had a talk with appellant about the accident, and he answered that he had, and that appellant had told him the number of his car. He was then asked if he made any other statement, and he answered: 'He said he had insurance on the car.' That illegal testimony came from the appellee, who must have known it was very improper testimony. In consulting with his attorney, he must have told him about the conversation with appellant, or he would not have been interrogated about it, and we must presume that his attorney informed him that such testimony was not permissible. He must have appreciated the effect it would have upon a jury trying a case between two citizens, when it was made known, that a corporation, and not the defendant, would have to discharge the judgment for damages. He must have known that the wavering balance would go down against the 'soulless corpora-

tion.' No amount of admonition to the jury could remove the effects of the testimony, because it could not remove the knowledge that the suit was not one between citizens, but between a citizen and a corporation.

"Appellee can not escape the effect of the testimony given by him on the ground of his ignorance of the baneful effect it would have upon the jury. He must be given credit for common sense and at least a modicum of knowledge of human nature. Judgments have been reversed where attorneys have injected such matters into a trial, and we can not see that the party has any more right to bring in such matters than would the attorneys. In the case of the latter, he might with some degree of reason claim he had not authorized it; but he has nothing to justify, excuse or palliate his deliberate conduct in bringing such testimony before the jury. In the statement of facts it is indicated that he was anxious to tell about the insurance company, for after telling about appellant giving him the number of his automobile, he said, 'He made another statement about the car.' When asked what it was, he replied, 'He said he had insurance on the car.' The circumstances indicate that he knew that such statement would have a deadly effect on the interests of appellant and therefore testified to it.

* * * * *

"There is no authority for holding that it was the duty of appellant when the unlawful evidence was brought into the case by appellee to ask that the cause be withdrawn from the jury and continued. Such a ruling would preclude a hearing in this Court on any error of the trial Court, unless there was a formal demand for a withdrawal of the cause from the jury and an application for a continuance or postponement. There are some matters that may arise that would call for such action upon the part of the complaining party, such as discovering the disqualification of a juror during the trial, or when a party is surprised by the testimony of his witness;

but such rule has never been applied to the admission of illegal evidence. Appellant did all that was required of him when he objected to the evidence and reserved a bill of exceptions to the admission of the testimony.

"Appellant was in no way responsible for the admission of the illegal testimony. He could not have known what appellee intended to state when he told him not to state what any one but appellant said. The responsibility for the injection of the damaging testimony rests upon appellee. He voluntarily gave the testimony and is charged with a knowledge of its illegal and damaging character.

"The motion for rehearing is granted, and the judgment is reversed and the cause remanded."

The following is quoted from the opinion of the Court in *Fleming v. Hartrick*, 141 S. E. 628 (W. Va., 1928), wherein numerous authorities are cited (page 629):

"This court has held in numerous cases that the jury should not in any manner be apprised of the fact that the defendant owner, in an action for the negligent operation of an automobile, is protected by indemnity insurance, and such action on the part of the plaintiff or his counsel will ordinarily constitute reversible error, notwithstanding the court may instruct the jury not to consider the same in arriving at a verdict."

The subject here discussed is fully treated with citations of many authorities in *Law Applied to Motor Vehicles*, 3d Edition, by Babbitt, Section 1047; also in *Blashfield Cyclopedia of Automobile Law* (1929), Vol. 4, Sec. 19; and in *Simpson on the Law as Applied to Automobile Insurance*, Sec. 341.

TESTIMONY BY PLAINTIFF SHOWING THAT THE DEFENDANT WAS PROTECTED BY LIABILITY INSURANCE, BEING INCOMPETENT FOR ANY PURPOSE IN THIS CASE, IS NOT ADMISSIBLE MERELY BECAUSE IT CAME INTO THE TESTIMONY AS PART OF A CONVERSATION SOME OF WHICH IS ADMISSIBLE.

Under the guise of stating the substance of a conversation between himself and the defendant in which the defendant was said to have admitted that the accident was due to his fault, the plaintiff voluntarily stated that the defendant said that he (the plaintiff) would not suffer any loss as he (the defendant) was fully insured. In his ruling on defendant's objection, the trial Justice expressed the opinion that the testimony relating to insurance was competent because it was part of a conversation which was clearly admissible. We concede that admissions by the defendant of facts showing him to have been negligent would be admissible, as declarations against interest, but we have searched in vain for authority which might sustain the proposition that incompetent evidence is admissible simply because it forms a part of a conversation, some parts of which are admissible. On the contrary, every decision, of which many have been cited, in which the mention of insurance has come into the testimony through such conversations, and in which the court has ruled that it was improper, is an authority opposed to the ruling of the trial court, as, for example, *Carter v. Walker, supra*.

If the ruling of the Court below be approved, it will open the door to the reception of evidence of insurance in every damage suit in which the defendant may have made any statements which are admissible on any ground

whatever, if, in the same conversation, the defendant refers to his insurance.

Moreover, as said in *Jones v. Sinsheimer*, 214 Pac. 375 (Oregon Sup. Ct., 1923) (page 376):

“The insurance is collateral matter. To litigate that subject in an action brought directly against the defendant for damages would be an attempt to affect the liability of the insurer without giving it its ‘day in Court,’ and would unjustly prejudice the jury against the defendant not only on account of his own actions, but also on account of popular antipathy against insurance companies.”

THE VERDICT IS CONTRARY TO THE EVIDENCE AND THE WEIGHT OF THE EVIDENCE.

While the overruling of a motion for a new trial on the ground that the finding of fact is contrary to the evidence and the weight of the evidence is not assignable as error (*Leapley v. Matthews*, — App. D. C. —, No. 5111, decided June 1, 1931, LIX W. L. R. 576), yet this Court in *Capital Construction Co. v. Holtzman*, *supra*, page 127, said it was “called upon to scrutinize closely the proceedings upon the trial, as disclosed by the record, to see that no evidence was improperly admitted, and that the result was not improperly affected by anything that occurred during the trial.” A like attitude is taken in *Manigold v. Black River Traction Co.*, 81 App. Div. 383, 80 N. Y. Supp. 861, and in other cases cited in this brief. An attentive reading of the record in this case leads unmistakably to the conclusion that the jury was prejudiced both by the evidence of the defendant’s insurance and by the trial Justice’s ruling upon the matter (R. 14), as may better appear from the following analysis of the evidence on the issue of negligence.

The plaintiff testified on direct examination that when he first saw defendant's car, he, plaintiff, was about 60 feet east of the intersection, at which time defendant was about 250 feet north of the intersection; that the plaintiff was proceeding in second gear; that after he had passed the center of the intersection the defendant's car struck the rear right wheel and fender of his car (R. 13). On cross-examination, plaintiff stated that the weather was clear and the street dry; that as he approached the intersection he was driving at a speed of about 10 miles per hour; that he did not stop before attempting to cross the intersection; that defendant was approaching the intersection on his right; that he did not stop and thus allow defendant to pass because he thought he could "make it" ahead of defendant (R. 15). While it is not here contended that this testimony necessarily shows contributory negligence on the part of the plaintiff, especially in view of this Court's ruling in *Bland v. Hershey*, — App. D. C. —, No. 5127, decided June 1, 1931, LIX W. L. R. 530, it is earnestly contended that this testimony, considered in connection with the rest of the testimony in the case, renders the issue of negligence extremely doubtful. H. L. Jacobs, the only witness who testified for the plaintiff, stated that he heard a crash but did not see the collision; that he went at once to the scene; that he noticed skid marks on the pavement, as if made by locked wheels; that one set of these skid marks began in 20th street about 10 feet north of the north curb line of L street and showed toward defendant's car, and that the other set of these skid marks began in L street a few feet east of the east curb line of 20th street and showed in the direction of plaintiff's car (R. 16). This controverts plaintiff's statement that he was proceeding in second gear at about 10 miles per hour, and is consistent with the testimony of defendant, who said that as he approached the intersection

he was driving at a speed of 15 to 18 miles per hour; that a truck parked on the north side of L street just east of the intersection obstructed his view to the east; that he did not see plaintiff's car until he was within the intersection, and then plaintiff's car appeared to come upon him from behind the truck at a rapid speed; that it all happened very suddenly; that when he saw a collision was imminent he turned his car to the right but did not succeed in avoiding plaintiff's car, which struck his car on the left front fender, both cars going into L street west of the intersection, where both cars tipped over (R. 17-18). Lawrence Dalton (colored), called by the defendant, testified that while he was walking east on the north side of L street a little east of 20th street, he heard screeching of brakes behind him, turned, and saw the two cars, "locked together" in collision, moving westward into L street west of the intersection, where both cars turned over; and that he and Winslowe helped right the cars (R. 19-20). This controverts the plaintiff's testimony, and supports the defendant's version. Albert Winslowe (colored), called by the defendant, testified that he was on the south side of L street near 20th street; that he heard a crash; that he saw the collision; that the plaintiff's car ran into the defendant's car; that he and Dalton helped right the cars (R. 20). The plaintiff himself testified that his car was righted by some colored men (R. 13). All the testimony shows that the two cars together ran westward into L street west of the intersection, a fact which, considered in the light of reason and nature's laws, controverts the plaintiff's version and supports the defendant's version. Seemingly, also, much light might have been shed on this subject by some evidence as to what part of the plaintiff's car was damaged, but the plaintiff produced none.

Although the weight of the evidence appears to be strongly in favor of the defendant, yet the jury returned a

verdict for the plaintiff of \$2,000. Why? Probably because the jurors knew that the defendant was "fully insured," and because the trial Justice had ruled adversely to the defendant upon his objection to mention of insurance being made, and had admitted the evidence of insurance to be considered by the jury along with the other evidence in the case (R. 14), so that their verdict would be, in effect, against a non-resident corporation which would have to pay the amount of it. The record discloses no other reason.

CONCLUSION.

For each of the several reasons assigned above, it is respectfully submitted that the judgment should be reversed and a new trial ordered.

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DEC 22 1931

IN THE

Henry M. Hodges

Court of Appeals, District of Columbia CLERK

APRIL TERM, 1931.

No. 5443.

HENRY H. BROOKE, *Appellant*,

v.

WALTER E. CROSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLEE.

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INDEX.

	Page
Statement	1
Argument and Authorities	6
Cases Similar to Instant Case	15

CASES CITED.

Antletz vs. Smith, 97 Minn. 217	8
Spoonick vs. Backus, 89 Minn. 354	8
Egner vs. Curtis, 96 Nebr. 18	8
Williamson vs. Hardy, 47 Cal. App. 619	8
Cozad vs. Raish Imp. Co., 175 Cal. 619	8
Scholte vs. Brabec, 224 N. W. 259—Minn.	8
O'Connor vs. Gillaspv, 170 Ind. 428	9
Grindstaff vs. Goldberg, 40 S. W. (2nd Series) 702	9
Nichols vs. Maxwell Motor Corp., 213 N. W. 128	9
Jablonowski vs. Modern Cap Co., 312 Mo. 176	10
Schuler vs. St. Louis Can Co., 322 Mo. 176	10
Levy vs. Berner, 293 Pacific 897—Cal.	10
Coblentz vs. Jaloff, 115 Oregon 656	10
Edwards vs. Smith, 286 S. W. 428—Mo.	10
Bradley vs. Cleary Co., 86 N. J. Law 338	11
Melcher vs. Connell, 250 Pacific 742—Oregon	11
Bennett vs. Portland, 265 Pacific 433—Oregon	11
Derner vs. Pistoiresi, 293 Pacific 78—Cal.	12
Todd v. Alexander, 294 Pacific 545—Wash.	12
Savage vs. Hayes Bros., 142 Ill. 316	12
Ky. Wagon Co. vs. Dugames, 113 S. W. 128	13
Aiken vs. Lee, 206 N. Y. 20	13

	Page
Smallen vs. Aronson, 253 Ill. App. 540.....	13
Hodge vs. Weinstock, 293 Pac. 80.....	13
Nichols vs. Nelson, 80 Cal. App. 591.....	14
Derner vs. Pistoiresi, 293 Pac. 78—Cal.....	14
Hamner vs. Janowitz, 131 Iowa 20.....	14
Gerbing vs. McDonald, 229 N. W. 861—Wis.....	14
Potter vs. Driver, 97 Cal. 311.....	7, 14
Demase vs. Nemitz, 258 Pac. 25.....	14
Dullanty vs. Smith, 265 Pac. 814.....	15
Fletcher vs. Saunders, 284 Pac. 276.....	15
Morris vs. Montgomery, 201 N. W. 496.....	15
Ward vs. De Young, 210 Mich. 67.....	16
Hedger vs. Davis, 236 Ky. 433.....	16
Nichols vs. Nelson, 80 Cal. App. 591.....	16
Sutzer vs. Allen, 236 Mich. 1	16
Wulze vs. Liguardo, 6 S. W. (2nd Series)—Mo..	17
Garvey vs. Ladd, 266 S. W. 733—Mo.....	17
Steinman vs. Brownfield, 18 S. W. (2nd Series) 528—Mo.	18
Trumpfeller vs. Crandall, 155 Atlantic 646—Me..	18
Gregoire vs. Allard, 152 Atlantic 489—N. H.....	19
Wells vs. Morroson, 256 Pac. 641—Oregon.....	19
Ariz. Cotton Oil Co. vs. Thompson, 245 Pac. 673 —Ariz.	19
McCurdy vs. Flibotte, 139 Atlantic N. H.	20
Frank vs. Corcoran, 158 N. E. 501—Ohio.....	20
Caddo Transfer Co. vs. Perry, 298 S. W. 337..	20
Bishop vs. Musick Co., 3 S. W. (2nd Series) Mo..	20
Paepke vs. Stadelman, 300 S. W. Mo. 845.....	20
Baldarachi vs. Leach, 44 Cal. App. 603.....	21
Rowe vs. Remick, 297 Pac. 605—Cal.....	21
Scholte vs. Brabec, 224 N. W. 259—Minn.....	21

Index Continued.

iii

	Page
Ambrose vs. Young, 130 S. E. 810—W. Va.....	21
Rockenstein vs. Rogers, 31 S. W. (2d Series) 800	21
Knutson Motor Co. vs. Steiner, 166 N. E. 243	
(Ohio)	22
Deffenbaugh vs. Interset Motor Co., 235 N. W.	
896—Mich.	22
Sutzer vs. Allen, 236 Mich. 1	22
Shane vs. Nat. Biscuit Co., 186 N. Y. 514.....	22
Lenahan vs. Pittston Coal Co., 221 Pac. 626.....	23
Simms vs. Martin, 33 Ga. App. 486.....	23
Ingram vs. Robinson, 199 Ky. 631.....	23
Harris vs. Koenig Coal Co., 223 Mich. 683.....	23
~~Hayes vs. Berry~~ <i>Muhlback in Muhlback - 242 S.W.</i>	23 ¹⁷⁴
Gibbs vs. Burton, 130 Atlantic 439 N. J.....	23

IN THE
Court of Appeals, District of Columbia

APRIL TERM, 1931.

No. 5443.

HENRY H. BROOKE, *Appellant*,
v.
WALTER E. CROSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

The plaintiff sued to recover damages for injuries to his person and destruction of his automobile resulting from a collision of the automobile operated by the defendant with the automobile operated by

the plaintiff on June 13, 1927, at 7 A.M., at the intersection of 20th and L St., N. W., Washington, D. C. The plaintiff testified that he was driving west on L street about 7.05 A.M., and that when he was about 120 feet from 20th street an auto backing out from a vacant lot caused him to stop, and he started again and was in second gear and when he was about 60 feet from 20th St. he saw the defendant in a Ford auto coming south on 20th St. That when he first saw defendant's auto it was about 250 feet north of L St., and that after he had passed the center of the intersection the defendant's auto struck the rear right wheel and fender of plaintiff's auto carrying it across L St. to the south curb of L St., and west of the west curb of 20th St., tipped over on its side with plaintiff inside until it was righted by some men and he was released. (R. 13) That a police officer appeared and talked with him and the defendant, and then a passing auto took him to the Emergency Hospital where his left hand and forearm were X-rayed and his left hand dressed. That he reached the hospital about 7.20 and had to wait till 7.55 for treatment and left the hospital shortly after 8 o'clock going to the Sanitary Grocery at 20th and H where the defendant was employed, and that he there talked with the defendant about the accident; that defendant made statements whereby he admitted that the accident resulted from the defendant's own fault; that the substance of defendant's statement was that he was due at the store at 7 o'clock and was five minutes late at the time of the accident, and that the plaintiff would not suffer any loss as he, defendant, was fully insured. Thereupon defendant's counsel objected to the evidence upon the ground that the alleged statement

of defendant that he was fully insured was incompetent, and prejudicial to the issues in the case, but the court overruled the objection, holding that the mention of insurance came into the case as part of a conversation which was clearly admissible, to which ruling defendant's counsel excepted. Plaintiff further testified that defendant in said conversation did not claim that plaintiff was in fault or make any defence of himself (R. 14). Plaintiff said that he received in the accident a lacerated wound of the left hand, a broken bone in the left hand and an incomplete fracture of one of the bones of his left forearm, and returned to the hospital six or seven times for treatment at a cost of \$25, and in July after the accident (which was June 13, 1927), he suffered with pains in his back and head and with fever and was taken to Georgetown Hospital by his physician and paid him \$100 and a specialist \$40, and a hospital bill of \$140 (R. 15). That when hurt he was getting \$25 per week at a gasoline station, and was not employed again for three months, and then he got employment at \$18 per week and at the end of nine months he again got wages of \$25 per week. That he paid \$475 for his auto, a Chevrolet coupe, and the cost of repairs was \$200. That at the time of trial (3 years and seven months after the accident) he had recovered except for a weakness in his left hand. On cross-examination he said he was 21 years old, at time of accident; that when accident happened he was driving about ten miles an hour; that defendant was driving at the rate of 40 miles an hour; that he could not judge defendant's speed very well as defendant was coming toward him, but that after the accident he calculated defendant's speed by measur-

ing the distance of 250 feet traveled by defendant while he traveled at ten miles an hour 60 feet (R. 15-16). Besides the testimony of the plaintiff there was abundant evidence in the record to justify the verdict of \$2000 damages. Plaintiff's injuries were serious and he was put to great suffering and expense. His doctor's bills were \$140, two hospital bills, one of \$25 the other of \$140, lost three months wages at \$25 per week, amounting to \$300, lost a reduction in wages of \$7 per week for 36 weeks or 9 months amounting to \$252, and lost \$200, expended for repair of auto, a total of \$1,057 (R. 15), so that the verdict of \$2000 was an allowance for a fractured hand and fractured arm and mental and physical suffering of but \$943. There was nothing therefore in the verdict that indicated that the mention of insurance affected the case. In addition to plaintiff's testimony the police officer who talked to the defendant at the time of the accident heard him say that he was late to work, and stated that defendant's car was overturned on the north side of L street, while plaintiff's car was overturned on the south side of L street, showing that defendant's car had struck a blow sufficient to knock the plaintiff's car entirely across the street and roll it over (R. 16). Defendant in his testimony tried to make it appear that his auto was overturned and lying at the south side of L street after the accident, but the plaintiff (R. 13) and officer Jacobs (R. 16), and defendant's three witnesses, (Brennan, Dalton and Winslowe) contradicted the defendant and testified that defendant's car was lying overturned at the northwest corner of L street and plaintiff's car lay overturned at the southwest corner, showing that defendant who was traveling

south on 20th street, struck the car of plaintiff traveling west on L street with such violence as to knock it across the street. Though defendant denied he was late he told the plaintiff he was due at the store at 7 o'clock and was 5 minutes late (R. 14), and told Officer Jacobs that he was late to work (R. 16), made no defense to the plaintiff or Officer Jacobs, told the plaintiff that if it were his fault he would prefer to settle out of court according to his own statement (R. 18), a fact from which the jury might infer an admission, admitted that he was the only employe who had the key to the store and that the store had to be opened at 7 o'clock, that he did not see plaintiff's car until he was in the intersection, and that *he did not know who was in fault* (R. 18). If he did not know who was in fault he could not believe that the plaintiff was in fault and the jury could well accept that statement as an admission that the plaintiff was not in fault. He admitted his talk with plaintiff after the accident at the store and did not deny that he said to the plaintiff that plaintiff would suffer no loss as he, defendant, was fully insured. Here we have the mention of insurance by the plaintiff as part of a conversation with defendant and incident to the matter of the accident, and from the way the defendant mentioned insurance the jury would have the right to weigh the statement as an admission of liability. If the defendant were not insured he might complain as a party to the cause that the mention of insurance had affected the case, but he admitted he was insured, voluntarily, and the insurance company, not a party to the cause, has no right to complain. The court and jury were dealing with the litigants, not with an insurance company not a party of record.

After the matter of insurance was mentioned by the plaintiff as part of his conversation with the defendant, it was never again referred to in the cause by counsel for either side either in speaking to the court or the jury, and attention is called to an incorrect statement in paragraph 2 of the motion for a new trial (R. 8), that the plaintiff commented upon the evidence of insurance in his closing argument to the jury. The bill of exceptions shows that is not correct as counsel never mentioned insurance throughout the whole trial.

ARGUMENT AND AUTHORITIES.

This matter is entirely different from the case of Capital Construction Co. vs. Holtzman, 27 Appeals D. C. 125, where counsel for plaintiff after bringing out from two witnesses that they were employed by the insurance company, went on and pressed upon the witnesses that any judgment obtained would be paid by the insurance company and argued that fact to the jury and admonished the jury that the real defendant was an insurance company. This Court expressly says in that case that asking the witnesses as to their relation to the insurance company was proper as tending to show bias and interest, but the misconduct of counsel was unpardonable.

It is settled law now that counsel for a plaintiff, if he knows that the defendant is insured and being defended by an insurance company who is in fact the real defendant, may question prospective jurors on their *voir dire* as to:

Whether any of them or any member of their families are interested as stockholder, officer,

agent or employe of any accident insurance company, or as brokers, dealers or salesmen.

- O'Connor Co. vs. Gillaspy, 170 Indiana 428.
 Jones vs. Mo. Freight Corp., 40 S. W. (2nd Series) 465 Mo.
 Schuler vs. St. Louis Can Co., 322 Mo. 765.
 Garvey vs. Ladd, 266 S. W. 733.
 Stone vs. Oliver, 294 Pacific 346 (Oregon).
 Antletz vs. Smith, 97 Minn. 217.
 Spoonick vs. Backus Co., 89 Minn. 354.
 Eyner vs. Curtis, 96 Nebraska, 18.
 Harker vs. Bushouse, 236 N. W. 222—Michigan.
 Stehouwer vs. Lewis, 227 N. W. 760—Michigan.
 Goss vs. Williams, 196 N. C. 213.
 Nichols vs. Nelson, 80 Cal. Appeals 591.
 Baldarachi vs. Leach, 44 Cal. Appeals 603.
 Potter vs. Driver, 97 Cal. 311.
 Williamson vs. Hardy, 47 Cal. Appeals.
 Cozad vs. Raisch Co., 175 Cal. 619.
 Arnold vs. Cal. Portland Cement Co., 41 Cal. App. 42.
 Langford vs. Kosterlitz, 290 Pac. 84.
 Scholte vs. Brabec, 224 N. W. 259—Minn.
 Nichols vs. Owen, 236 N. W. 169.
 Honcomp vs. Martin, 234 N. W.
 Church vs. Stoldt, 215 Mich. 469.
 Grubaugh vs. Murphy Co., 209 Mich. 551.

Counsel has examined all the above cases and they sustain in various ways the right of counsel to ascertain even in the examination of prospective jurors whether they have any interest in an insurance company. The questions to prospective jurors furnish ground for the exercise of a challenge for cause or a peremptory challenge, and are also necessary to secure to the plaintiff a fair and impartial trial. The matter is mentioned, though not necessary in this

case, to show that courts hold that knowledge that a defendant is insured brought to the attention of jurors on their voir dire does not disqualify them or work a mistrial, and that there are many situations where the mention of insurance is made before the jury that do not justify a mistrial.

In *Antletz vs. Smith*, 97 Minn. 217, the plaintiff's attorney was allowed to ask the defendant's attorney the name of the insurance company defending the case in order to properly question the prospective jurors on their voir dire. In *Spoonick vs. Backus Co.*, 89 Minn. 354, the plaintiff's attorney was allowed to call and interrogate defendant's attorney with reference to indemnity insurance of the defendant in order to enable the plaintiff's attorney to get an impartial jury by questioning prospective jurors on their voir dire. In *Egner vs. Curtis*, 96 Nebr. 18, it was held proper for plaintiff's attorney to ask prospective jurors if any of them were stockholders in the insurance company known to be defending the case.

In *Williamson vs. Hardy*, 47 Cal. App. 619, it was held proper for plaintiff's attorney to ask prospective jurors if they held stock in the Western Indemnity Co. known by plaintiff to be secretly defending the case.

In *Cozad vs. Raish Imp. Co.*, 175 Cal. 619, it was held proper for plaintiff's counsel to ask a prospective juror if he was not an intimate friend of the secretary of the insurance company known to be defending the case, so as to exercise a peremptory challenge. In *Scholte vs. Brabec*, 224 N. W. 259—Minn., it was held proper for counsel for plaintiff to ask counsel for defendant if an insurance company named was defending the case and was interested in the outcome

and then proceed to examine jurors on their voir dire.

In *O'Connor Co. vs. Gillaspy*, 170 Ind. 428, a doctor who paid plaintiff's hospital bill was asked if he was not re-imbursed by an insurance company. The court said:

“If the defendant was indemnified that contract was perfectly legitimate and no very cogent reason appears to us for keeping the fact a profound secret, and the objection urged might be for the benefit of a third party rather than for that of the appellant. If it be true, as suggested by counsel, that juries in this class of cases may be inclined to return more liberal verdicts against employers that are insured than against those that are not, this fact must be taken into account in making these contracts rather than to require courts to treat them as clandestine at the peril of committing reversible error.”

In *Grindstaff vs. Goldberg*, 40 S. W. Reporter (2nd Series) 702, the court said:

“If an insurance company is the real defendant and as such is resisting plaintiff's action and conducting a defense of its own contriving, it should be compelled to put aside its disguise and stand in the open. Both the court and the jury are entitled to know who are the real parties litigant. Questions relating to the admissibility of evidence, the weight to be given testimony, and the credibility of witnesses are involved.”

In *Nichols vs. Maxwell Motor Corp.*, 213 N. W. 128, a witness said that the body of plaintiff's intestate, a boy, had been moved by an insurance company. The court refused to withdraw a juror and a verdict for \$20,000 was reduced to \$15,000 and affirmed.

In *Snyder vs. Wagner Electric Co.*, 284 Mo., the plaintiff's attorney brought out that witnesses for the defendant were employed by an insurance company. The appellate court said:

“The case as it is presented in this record could not have been honestly placed before the jury without the disclosure of the relations which these witnesses sustained to the company. The defendant had no cause to complain of the position in which it placed itself for its own profit, or to shift the burden which it voluntarily assumed to the shoulders of the plaintiff.”

It is proper to ask a witness who has been sent by the defendant to examine the plaintiff whether he was employed by an insurance company and if he was not a regular insurance doctor. It is also proper to ask a witness who examined a machine that injured the plaintiff if he was not sent to the factory by an insurance adjuster.

Jablonowski vs. Modern Cap Co., 312 Mo. 176.
Schuler vs. St. Louis Can Co., 322 Mo. 765.
Levy vs. Berner, 293 Pacific, 897 Cal.

In *Coblentz vs. Jaloff*, 115 Oregon 656, plaintiff testified to certain X-rays which were taken by a Dr. Walker. Asked if any others were taken he answered that others were taken at the request of the insurance company representing the defendant bus company. Held there was no error in refusing to discharge the jury.

In *Edwards vs. Smith*, 286 S. W. 428—Mo. the plaintiff was being questioned as to medical treatment in his suit against a cotton gin company, and was

asked: "How about the pay?" He answered: "The insurance people of the gin company paid the doctor's bill." Held court did not err in refusing to discharge the jury.

In *Bradley vs. Cleary Co.*, 86 N. J. Law 338, plaintiff's son said he refused to let a physician examine his father because he was an insurance physician. The court refused to discharge the jury. Later the son said: "A man came to me and said he was an adjuster for the Ocean Accident Insurance Co." The court again refused to discharge the jury. The appellate court said:

"After the examination of the whole record we find no error which injuriously affected the substantial rights of the defendant and the judgment is affirmed."

In *Melcher vs. Connell*, 250 Pacific 742—Oregon, a doctor testified that he treated plaintiff's eyes two or three months and after that the insurance company sent him to an oculist. The court refused to discharge the jury. The appellate court said:

"The injuries sustained by the plaintiff were very substantial, the verdict was not excessive, and we cannot find in the record anything tending to show that the jury was improperly influenced or in anyway prejudiced by the unwarranted and unsolicited statement of the witness."

In *Bennett vs. Portland*, 265 Pacific, 433—Oregon, while plaintiff's attorney was cross-examining a doctor he stated that a stranger representing the Travelers Insurance Co. took them. The appellate court said:

“We think the plaintiff was within his rights in inquiring who took the pictures. As we understand the rule it applies only where the fact of insurance is brought out for the express purpose of prejudicing the defendant’s case in the eyes of the jury.”

In *Dermer vs. Pistoiresi*, 293 Pacific 78—Cal., plaintiff’s counsel asked defendant on cross-examination as to who he told about the accident and he answered that an insurance man came to see him. The court refused to declare a mistrial and the appellate court in affirming the verdict quoted from *Blashfield’s Cyc. of Auto Law*, page 1521:

“The fact of such insurance may, however, incidently and unavoidably appear. There are many instances in which it may be legitimately developed in cross-examination, and if it tends to prove any issue in the case or is relevant or material for any purpose, it cannot be excluded on the ground that it may prejudice the defendant.”

In *Todd vs. Alexander*, 294 Pacific 545—Washington, plaintiff’s counsel asked plaintiff on re-direct examination whether plaintiff employed the physician that defendant’s counsel questioned her about, and she replied that the physician had been sent to her on behalf of the Liability Insurance Agents. Held there was not error in refusing to discharge the jury.

In *Savage vs. Hayes Bros.*, 142 Ill. 316, a witness for plaintiff was cross-examined by defendant’s counsel about a statement he had signed concerning the accident. On re-examination by plaintiff’s counsel he was asked why the statement was sought from him

and answered that Garrett was an agent of the insurance company. Judgment was affirmed.

In *Kentucky Wagon Co. vs. Dugames*, 113 S. W. 128, plaintiff's counsel asked him what doctor waited on him, and said: "I guess we can agree that it was the company's doctor or the insurance company's doctor?" The remark was held improper but the court said:

"The appellee suffered serious injury and there being abundant proof of negligence we will not reverse the judgment for the impropriety of the above remark."

In *Aiken vs. Lee*, 206 N. Y. 20, the mention by the chauffeur that the defendant's car was insured came into the case in the testimony of the father of the plaintiff. The court held that it was not reversible error, but that the cross-examination of the defendant as to insurance was.

In *Smallen vs. Aronson*, 253 Ill. App. 540, a witness for plaintiff was asked if he scratched out something on a paper and answered that: "A man from the insurance company wrote that out." The appellate court said:

"The verdict is below the usual amount awarded, and the case is reasonably clear on the facts, there is no reason to suspect that the jury was actuated by prejudice or passion."

In *Hodge vs. Weinstock*, 293 Pacific 80, a woman tripped on a platform in a store. Counsel for plaintiff asked witness who took the photos and she said they were taken by insurance broker, and counsel asked if he had not taken pictures introduced by de-

fendant. Court refused to withdraw juror. Appellate court said:

“If the evidence or suggestion of insurance is brought out as an incident to the proof of some other fact, properly involved, it is without error.”

Cites *Nichols vs. Nelson*, 80 Cal. App. 591.

Derner vs. Pistoiresi, 293 Pacific 78—Cal.

In *Hamner vs. Janowitz*, 131 Iowa 20, an action for death by wrongful act, counsel for appellee sought to prove that the appellant was protected by insurance to pay for which a portion of the wages of deceased had been taken out. Objection was sustained but court refused to discharge jury. Appellate court said:

“If the fact of the offering incompetent or immaterial testimony which is excluded, is to be held a cause for granting a new trial few, if any, verdicts could stand the test of such rule.”

In *Gerbing vs. McDonald*, 229 N. W. 861 (Wis.), defendant on cross-examination brought out in an answer, not responsive to the question, that he has protective insurance. The court refused to withdraw a juror. Judgment was affirmed.

In *Potter vs. Driver*, 97 Cal. 311, plaintiff testified that defendant said that one Henretty was representing the insurance company and he would be asked if it were necessary to call a doctor, and she said: “Well, you are insured are you?” Court refused to strike out statement and held not error.

In *Demase vs. Nemitz*, 258 Pac. 25, witness on examination by counsel said: “He said the insurance

man", and was interrupted. Not error to refuse to withdraw juror.

In *Dullanty vs. Smith*, 265 Pac. 814, plaintiff's counsel read a deposition which disclosed that defendant was insured. The court told the jury to dismiss insurance from their thoughts but refused to withdraw a juror. Judgment was affirmed.

In *Fletcher vs. Saunders*, 284 Pac. 276, a witness was asked who brought him to court, and answered: "The insurance company." The judgment was affirmed, the court saying:

"It is possible, however, that the fact that the defendant is insured may be incidental to some other fact which is relevant, material and admissible."

In *Morris vs. Montgomery*, 201 N. W. 496, plaintiff testified that when he talked to the defendant at the hospital an insurance adjuster was present. The court affirmed the judgment saying:

"The rule of exclusion, perhaps, ought to continue even though everyday affairs have moved beyond its original reason, but it ought not to be employed to set aside judgments except in cases of flagrant violation."

CASES SIMILAR TO INSTANT CASE AFFIRMED.

In the instant case the sole question is whether an inadequate and just judgment should be reversed because the plaintiff testified that after getting out of the hospital, a few hours after the accident, he went to the store of the defendant and defendant admitted that the accident resulted from defendant's own fault; that defendant said he was due at the store at 7

o'clock and was five minutes late; that defendant did not claim plaintiff was in fault or make any defence of himself, and said that the plaintiff *would not suffer any loss as he, defendant, was fully insured.* (R. 14) The defendant never denied making the statement as to insurance. The matter of insurance was never referred to by counsel in the case nor by anyone after the above statement of the witness.

In Ward vs. DeYoung, 210 Mich. 67, the plaintiff testified that when able to be out he went to the store of defendant and defendant said his driver had cut across the corner and that he was liable and that the insurance company was liable and would have to settle, and that at another time the defendant told plaintiff the insurance company would be up to see him. Defendant denied having made the statements. The court refused to withdraw a juror. The judgment was affirmed.

In Hedger vs. Davis, 236 Ky. 433, where the reference was made to the fact that the defendant was insured by a witness, but that counsel was careful not to refer to the matter throughout the case, the reference to insurance was held no ground for reversal.

In Nichols vs. Nelson, 80 Cal. App. 591, the appellate court held that it was proper to show that when defendant acknowledged responsibility for the accident he said he was insured.

In Sutzer vs. Allen, 236 Mich. 1, the plaintiff was injured in an auto accident, and the taxi driver who carried him to the hospital testified that half hour later he talked to the defendant who said he knew he was at fault and the insurance company would take care of it. Judgment for the full amount sued for was affirmed.

In *Wulze vs. Liguardo*, 6 S. W. Rep. (2nd Series) Mo., plaintiff asked defendant:

“What do you mean by running into my car when I was standing perfectly still?” and defendant replied: “I know I turned too far, my insurance, however, will take care of you.” And at another time the plaintiff testified that the defendant said: “But never mind, it will be taken care of, I have insurance.” In both instances defendant’s counsel moved to discharge the jury. The appellate court said: “Now the evidence was that the defendant while at the scene of the accident admitted the collision *and impliedly at least* admitted liability by saying that the insurance company would take care of her damages if she suffered any. We think this was competent as an admission against the defendant’s interest. We may not say that the testimony as to the defendant’s statement at the time of the accident about insurance was so wholly disconnected from the other language and admissions that it had no relevancy whatever in connection with it.”

In *Garvey vs. Ladd*, 266 S. W. 733, Mo., plaintiff testified that when defendant handed him his identification card he said: “I am insured.” The appellate court said:

“It was a vital matter whether the defendant at the time of the collision recognized his liability and admitted he was to blame. Would not the fact that as he handed his identification card to plaintiff he said: ‘I am insured,’ be a strong corroborative fact in support of the plaintiff’s version of what occurred. Plaintiff’s bare unsupported statement that defendant admitted he was to blame might appear extremely unrea-

sonable, but it would not appear so unreasonable if it appeared in connection with that statement that defendant said: "I am insured." * * * If this fact tended to render reasonable or to corroborate what plaintiff said as to defendant's admission of liability, then plaintiff had a right to prove it even if it did incidentally disclose such insurance to the jury."

In *Steinman vs. Brownfield*, 18th S. W. (2nd Series) 528, Mo., plaintiff's attorney said in opening statement that defendant said while taking plaintiff to the hospital: "It is unfortunate but I was in a hurry to get those fish to my restaurant, but I am covered by insurance and I think you will be properly taken care of." The court refused to discharge the jury. The appellate court said:

"It is a fact of great significance that plaintiff positively testified to the very statement made by her counsel. Generally speaking the cases hold that it is competent to show that there is liability insurance where that fact goes to prove any material issue properly in the case, and particularly that plaintiff has a right to prove any fact which tends to render reasonable or to corroborate an admission of liability by defendant even though the making of such proof may incidentally disclose that the latter is protected by a policy of insurance. Now in this instance the statement of defendant that he was covered by insurance and that he thought that plaintiff would be properly taken care of, was an implied if not actual admission of liability for the accident and thus competent in evidence as an admission against interest."

In *Trumpfeller vs. Crandall*, 155 Atlantic 646—Maine, the plaintiff was a guest in an auto and

plaintiff said in referring to the defendant that: "He said he wasn't responsible for the accident—the insurance company was." The appellate court in affirming the judgment said: "We cannot say that the defendant was prejudiced on the question of liability." The defendant's counsel did not claim the verdict excessive.

In *Gregoire vs. Allard*, 152 Atlantic, 489 N. H., plaintiff's father testified that he asked the defendant: "Why did you go so fast with four wheel brakes?" and defendant said: "Never mind, I am insured with an insurance company and they will pay all bills if I hit anybody." The appellate court said:

"The defendant's answer to the question of the witness in either of the forms which were findable upon the evidence clearly imported an admission of excessive speed. It is difficult to see how the admission under the circumstances could have been separated from the reference to insurance. Judgment on verdict. All concur."

In *Wells vs. Morroson*, 256 Pacific, 641 Oregon, plaintiff stated that the day after the accident he talked to the defendant about wrecking his car and defendant said: "I am insured, and it does not cost me, it is the insurance company that will have to pay this bill." A motion to discharge the jury was overruled. The court said: "The record shows that the defendant had a fair and impartial trial and that the verdict is not the result of passion or prejudice."

In *Arizona Cotton Oil Co. v. Thompson*, 245 Pac. 673—Arizona, plaintiff was asked by defendant's counsel about a paper he signed. On re-direct plaintiff's counsel asked him under what conditions he

signed the paper and said: "A man who said he was an adjuster for an insurance company prepared it." It was held not error for the court to refuse to discharge the jury and a judgment for \$10,000 was reduced to \$7500 and affirmed.

In *McCurdy vs. Flibotte*, 139 Atlantic,—N. H., the testimony was that the defendant said: "I shouldn't worry, I have got insurance." The jury was instructed to use the evidence only *as an admission of blame*. Judgment was affirmed.

In *Frank vs. Corcoran*, 158 N. E. 501—Ohio, which was an auto collision at an intersection, the court said that "the rule as to excluding testimony as to insurance must not be so applied as to render conversations incompetent for the sole reason that the parties discussed liability insurance." A verdict for \$5000 was affirmed.

In *Caddo Transfer Co. vs. Perry*, 298 S. W. 337—Ark., which was a collision between autos, plaintiff referred to one of the defendant's cars that had insurance on it. Held it was not error to admit the evidence.

In *Bishop vs. Musick Co.*, 3 S. W. (2nd Series, Mo.,) it came out in the evidence that defendant was insured. The appellate court said:

"And in any event the insurance company being the party ultimately concerned in any judgment rendered, was in no position to demand either that its identity be concealed or the facts of its connection with the case be suppressed so long as plaintiff's attorney acted throughout in good faith."

In *Paepke vs. Stadelman*, 300 S. W., Mo. 845, collision of auto at an intersection, the plaintiff tes-

fied that after the accident he went to see the defendant and was told by him that he would have to see the insurance company. Judgment was affirmed.

In *Baldarachi vs. Leach*, 44 Cal. Appeals, 603, a witness testified that he said to the defendant: "You ought to be strung up for running into a woman in that fashion", and that defendant made no reply. The court held that the matter ought to go to the jury "on the theory that the silence of the defendant was susceptible of being construed as in some degree an admission of negligence or fault on his part in running over the plaintiff", and that "the character of the statement addressed to the defendant was such that his failure to make response might reasonably suggest to the jury a realization of negligence on his part."

In *Rowe vs. Remick*, 297 Pac. 605—Cal., a witness testified that after the accident defendant said: "Don't worry, everything is all right, I got \$100,000 to \$200,000 insurance, and you don't have to worry about insurance, I will take care of everything, but is the baby alright." The judgment was affirmed.

In *Scholte vs. Brabec*, 224 N. W. 259—Minn., which was an action for malpractice, plaintiff's counsel asked doctors who testified for defendant if they were interested in any insurance company. The questions were held proper, and a verdict for \$8,500 for treating an injured arm improperly was affirmed.

In *Ambrose vs. Young*, 130 S. E. 810—W. Va., a witness testified that defendant said to him 15 or 20 minutes after the accident that he owned the car and that it was insured, the court refused to discharge the jury and the judgment was affirmed.

In *Rockenstein vs. Rogers*, 31 S. W. (2nd Series)

800—plaintiff testified that defendant expressed regret and sympathy and wrote the name of a casualty company on a card and said: "Now there is my insurance company." The court refused to discharge the jury and it was held not error.

In *Knutson Motor Co. v. Steiner*, 166 N. E. 243 (Ohio), a witness stated that one Benson had said that he had turned his report into the insurance company, and the appellate court that though the statement as to insurance was hearsay it did not justify the reversal of the verdict.

In *Deffenbaugh vs. Interset Motor Co.*, 235 N. W. 896—Mich., reference was made to insurance lawyers during the trial. The court said that the rule of exclusion as to insurance "ought not to be employed to set aside judgments except in flagrant cases." A verdict for \$35,000 for injury to a minor was affirmed.

In *Sutzer vs. Allen*, 236 Mich. 1, a witness testified that after he took plaintiff to hospital he talked with the defendant, who said that he "knew he was at fault but that the insurance company would take care if it." The court refused to withdraw a juror. The appellate court said:

"It has now become common knowledge that people owning automobiles have them insured, and because that fact in a particular case reaches the ears of the jury during the trial it is no longer reversible error unless improper use is made of it by counsel for the evident purpose of inflaming the passions of the jury."

In *Shane vs. National Biscuit Co.*, 186 N. Y. 514, it was held not reversible error for the plaintiff to relate a conversation with the agent of the insurance company although it brought to the attention of the

jury, unwarrantably, that the insurance company was defending the accident.

In *Lenahan vs. Pittston Coal Co.*, 221 Pac. 626, an attorney who took the stand to discredit plaintiff was asked if he was not attorney for the insurance company that insured the defendant. It was held proper, and not error.

In *Simms vs. Martin*, 33 Ga. App. 486, it was held proper to admit a statement of defendant referring to the fact that he was insured, immediately following the collision.

In *Ingram vs. Robinson*, 199 Ky. 631, a witness was asked a question as to insurance but before the question was answered it was withdrawn. The court refused to discharge the jury and the appellate court affirmed the verdict.

In *Harris vs. Koenig Coal Co.*, 223 Mich. 683, a witness testified that reports of the accident in which plaintiff was injured were sent to the insurance company. Held not reversible error to refuse to discharge the jury.

In *Hayes vs. Berry*, it was held that colloquys of counsel and innuendos as to the exclusion of a witness as to insurance, or to refer to a report of the accident made to an insurance company was not reversible error where the record showed the defendant had a fair trial and the judgment not excessive.

In *Gibbs vs. Burton*, 130 Atlantic, 439, New Jersey, it was brought out that the defendant carried liability insurance. The appellate court held that the matter was in the discretion of the trial court.

Respectfully submitted,

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